ERIVESTO ANDERSON & ORS

v.

PP

COURT OF APPEAL, PUTRAJAYA
MOHD SAARI YUSOF JCA
PS GILL JCA
RICHARD MALANJUM JCA
[CRIMINAL APPEAL NO: W-05-46-2000]
10 NOVEMBER 2004

EVIDENCE: *Identification evidence - Need for close scrutiny - Evidence against accused dependent wholly or substantially on identification evidence - Whether caution necessary before convicting on such evidence*

EVIDENCE: *Identification evidence - Identification of accused - Evidence against accused dependent wholly or substantially on identification evidence - Factors to be taken into consideration in assessing such evidence*

EVIDENCE: *Identification evidence - Identification of accused - Failure of judge to specifically refer to R v. Turnbull - Assessment of identification evidence nevertheless based on the Turnbull guidelines - Whether such assessment flawed*

EVIDENCE: *Information leading to fact discovered - Admissibility of statement - Voluntariness - Vested discretion in trial judge to exclude evidence prejudicial to accused even though such evidence technically admissible - Evidence Act 1950, s. 27*

EVIDENCE: *Statement - Accused's statement to police - Verbal statement and facial expressions - Whether contemporaneous so as to be inextricably linked - Whether there was evidence of nexus between statement and facial expression*

The three appellants were convicted and sentenced to death for the murder of three persons on 20 February 1997. The evidence against the first and second appellants rested mainly on the identification evidence of witnesses. However the only evidence linking the third appellant with the crimes was largely circumstantial evidence. The prosecution's case against the third appellant was that a blood stained RM5 note was recovered from him. The blood on a DNA analysis revealed *inter alia* the blood profiles of PW7, one other person and one of the deceased victims. The prosecution also relied on the evidence of PW33, ASP Thomas Navamoney, who in the main said in evidence that the

third appellant had allegedly given him certain information at about 4.15pm on 21 February 1997 which led to the discovery of a blood stained shirt P43A. The bloodstain, in a DNA analysis, revealed the blood of PW7 and one of the deceased victims. There was also the evidence adduced through ASP Navamoney that the third appellant was supposed to have pointed at something with his facial expression and said 'that could be the bundle'. There were also challenges mounted on PW33 in regard to the third appellant being assaulted by police officers whilst in custody. This was alleged to have taken place on 24 February 1997. The trial judge did not discount the fact that the assault may have taken place, but instead held that the date of the alleged assault was on 24 February 1997, whilst the information leading to the discovery was made on 22 February 1997. The trial judge therefore held that the assault could not affect the discovery.

Held

Per PS Gill JCA delivering the judgment of the court:

[1] In cases where the evidence against an accused depends wholly or substantially on the correctness of the identification of such an accused, which the defence alleges to be unreliable, the trial court should warn itself of the specific need for caution before convicting such an accused in reliance of the identification. Judges should warn themselves that a witness, or a number of witnesses, may make an honest mistake in identification about the presence of an individual at the scene of the crime. (p 671 b-c)

[2] When deciding on the correctness of an identification, the trial judge should reflect and perhaps ponder on the length of time the witness has observed such an accused, the distance, lighting conditions, whether there was anything to impede or distract his process of observation, and whether the witness has seen such an accused previously, and if so what was it that caused him to remember such an accused. Special features, that such an accused may have, should be taken into account as supporting evidence to fortify a witness's identification of an accused to a police officer. (p 671 d-e)

[3] Even though the trial judge did not allude to the celebrated case of *R v. Turnbull,* he had, in fact, in his own way, followed the guidelines propounded in the said case and held that the quality of the identification evidence remained steadfastly good. There was no flaw in the assessment of the trial judge's finding of fact that PW8 had correctly identified the first and second appellants as the perpetrators of the offence. There was therefore no reason to disturb the findings of the trial judge. (p 674 a-c)

[4] The trial judge, before convicting the first and second appellants, gave due consideration as to why the defence of the first and second appellants did not raise a reasonable doubt in the prosecution's case. The test propounded in *Mat v. PP* [1963] 29 MLJ 263 was actually applied by the trial judge. (p 677 f)

[5] The trial judge rightly found that the recovery of the said RM5 note in itself had no bearing on the involvement of the third appellant in the said crime, as it could not in itself stand to prove that he was present at the scene of the crime. He could have received the said note, innocently. (p 679 a)

[6] There was a paucity of evidence whether the statement purportedly made by the third appellant and his facial expression, which led to the discovery of the offending object, was made contemporaneously, so as to be inextricably linked, to be admitted as a statement of the third appellant. There had to be evidence of a nexus between the statement and the facial expression of the third appellant for it to be admitted as cogent evidence. No evidence was adduced in court to state what exactly the facial expression looked like, or seemed like, for the court to assess. (p 682 a-b)

[7] It is clear from the judgment of *Goi Ching Ang v. PP* that there is a vested discretion in a trial judge to exclude evidence which is prejudicial to an accused person even though the said evidence may be technically admissible. In the instant case, the trial judge was slightly flippant when dealing with the issue of the third appellant being assaulted by the police. The trial judge did state that since the date of the assault occurred two days after the information leading to the discovery, it could not have affected the voluntariness of the information leading to the discovery. However, it should be considered that if the assault against the third appellant did take place two days after the discovery, what was then there to stop the police from committing the assault earlier in order to extract information prior to leading to the discovery. There were grave doubts not only on the overall evidence of PW33 but also on the surrounding circumstances leading to the giving of the information. Shorn off this evidence there was no evidence to link the third appellant with the said crimes. (pp 683 g, 684 a-b & d-e)

[First and second appellants' appeals dismissed; third appellant's appeal allowed.]

Case(s) referred to:
Goi Ching Ang v. PP [1999] 1 CLJ 829 FC ***(refd)***
Lee Lian & Ors v. PP [1956] 22 MLJ 191 ***(refd)***
Lim Kah Wan v. PP [1985] 2 CLJ 473; [1985] CLJ (Rep) 530 HC ***(refd)***
Mat v. PP [1963] 29 MLJ 263 ***(refd)***
Pang Chee Meng v. PP [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265 SC ***(refd)***
PP v. Ooi Chun Seng [1991] 1 CLJ 609; [1991] 3 CLJ (Rep) 611 HC ***(refd)***
PP v. Siew Sung [1966] 1 MLJ 145 ***(refd)***
R v. Turnbull & Ors [1976] 3 All ER 549 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 113
Evidence Act 1950, s. 27

For the 1st appellant - Rusli Zain; M/s Zain & Co
For the 2nd appellant - Colin Sequerah (Amer Hamzah); M/s Colin Sequerah
For the 3rd appellant - Gurbachan Singh; M/s Bachan & Kartar
For the prosecution - Abd Wahab Mohamed (Muhamad Iskandar)

Reported by Andrew Christopher Simon

JUDGMENT

PS Gill JCA:

On 23 May 2003, we heard and dismissed the appeal of the 1st and 2nd appellants and allowed the appeal of the 3rd appellant. We indicated that we would state our reasons for doing so at a later date. 1st and 2nd appellants have filed an appeal against our decision to dismiss their appeal. The public prosecutor has also filed an appeal against our decision to allow the appeal of the 3rd appellant.

The three appellants were convicted and sentenced to death on 13 June 2000 by the learned trial judge on the following charges:

1. WILAYAH PERSEKUTUAN PERBICARAAN JENAYAH BIL.45-4-98

PERTUDUHAN

Bahawa kamu bersama-sama seorang lagi yang masih bebas pada 20.2.1997 jam lebih kurang 11.15 malam, di kedai No. 432, Tingkat 1, Jalan Tuanku Abdul Rahman, dalam daerah Dang Wangi, dalam Wilayah Persekutuan Kuala Lumpur, di dalam meneruskan niat bersama kamu seperti yang ditakrifkan di bawah seksyan 34 Kanun Keseksaan, telah melakukan bunuh dengan menyebabkan kematian terhadap Yong Seong Fong, Kad Pengenalan 561123-10-5815 dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyan 302 Kanun Keseksaan.

2. WILAYAH PERICARAAN JENAYAH Bil. 45-5-98

Bahawa kamu bersama-sama seorang lagi yang masih bebas, pada 20.2.1997 jam lebih kurang 11.15 malam, di kedai No. 432, Tingkat 1, Jalan Tuanku Abdul Rahman, dalam daerah Dang Wangi, dalam Wilayah Persekutuan Kuala Lumpur, di dalam meneruskan niat bersama kamu seperti yang ditakrifkan di bawah seksyen 34 Kanun Keseksaan, telah melakukan bunuh dengan menyebabkan kematian terhadap Yong Seong Fatt, Kad Pengenalan 4660815 dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

3. WILAYAH PERSEKUTUAN PERBICARAAN BIL. 45-6-98

Bahawa kamu bersama-sama seorang lagi yang masih bebas, pada 20.2.1997 jam lebih kurang 11.15 malam, di kedai No. 432, Tingkat 1, Jalan Tuanku Abdul Rahman dalam daerah Dang Wangi, dalam Wilayah Persekutuan Kuala Lumpur, di dalam meneruskan niat bersama kamu seperti yang ditakrifkan di bawah seksyen 34 Kanun Keseksaan, telah melakukan bunuh dengan menyebabkan kematian terhadap Yong How Fei, Kad Pengenalan 780516-14-5789. dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

The brief facts of the case are as follows. The murder of three persons took place on the 1st Floor of No. 432, Jalan Tuanku Abdul Rahman on 20 February 1997 at about 11.15pm. A group of blacks entered a beauty saloon. A young man namely Yong Seong Fatt was resting in the saloon when he was set upon by the group of assailants with a chopper and as a result of injuries inflicted on him he died.

The group then traversed through the saloon through a flight of stairs and entered into a shop selling watches and leather goods. Thereafter, the group continued their rampage, attacked and killed Yong How Fei and Yong Seong Fong. The group's callous attack continued when they moved on to slash the head of Goh Kim Soo (PW7) and Lam Yin Choy (PW8). Both PW7 and PW8 survived the ordeal and testified in court about the gruesome events of that night.

Suffice to say, much of the prosecution's case rested on the evidence of PW7 and PW8, particularly that of PW8. The evidence of PW8 was as to the identity of the 1st and 2nd appellant who murdered the persons named in the charge on 20 February 1997. It must be borne in mind that one of the persons involved in the killing of the deceased persons on the night in question is still at large.

In the context of the identification evidence of both these witnesses PW7 and PW8 relating to the 1st and 2nd appellant much was made by both their respective counsel as regards the quality of the identification evidence, bearing in mind, counsel contended, the extenuating circumstances in which the identification was made as regards both the 1st and 2nd appellant.

We did bear in mind, that in cases where the evidence against an accused depends wholly or substantially on the correctness of identification of such accused, which the defence alleges to be unreliable, the trial court should warn itself of the specific need for caution before convicting such accused in reliance of the identification. Judges should warn themselves that a witness, or a number of witnesses might make an honest mistake in identification about the presence of an individual at the scene of the crime.

Judges should also examine the manner in which the identification was made, and the period that had lapsed between the observation and subsequent identification of the said witness.

When deciding on the correctness of identification the trial judge should reflect and perhaps ponder on the length of time the witness had observed such accused, the distance, lighting conditions, whether there was anything to impede or distract his process of observation, and whether the witness had seen such accused previously, and if so what was it that caused him to remember such accused. Special features, that such accused may have had, like a significant tattoo on his right eye, a pronounced gait, a cleft lip are instances that may be taken into account as supporting evidence to fortify a witness identification of an accused to a police officer which supports the subsequent identification of such accused.

In respect of identification evidence the case of *R v. Turnbull & Ors* [1976] 3 All ER p. 549 and the guidelines propounded by Lord Widgery CJ still remains an authoritive decision on the reliability of visual identification of an accused by witnesses. The decision is timeless and is often quoted by our apex court in the context of identification evidence.

Against this backdrop, we examined the correctness of the trial judge when accepting the evidence of PW7 and PW8 in respect of their identification of the 1st and 2nd appellants involvement in the said murders. We believe that the trial judge's assessment of their evidence in this respect is worthy of reproduction. We choose however to only reproduce extracts of the trial judge's judgment pertaining to the identification evidence of PW8 as against the 1st and 2nd appellants:

The Evidence

The person who witnessed the violence from the time it started when Yong Seong Fatt was struck down in the beauty saloon till he himself fainted after being attacked on the head with the chopper was Lam Yin Choy (PW8). The other eye witnesses of the incident at the premises could not identify any of the accused as any of the assailants.

Lam, an employee of the shop that dealt with watches and leather goods, was at about 11 pm on 20.2.1997 tidying up the shop. His unchallenged evidence was that the shop was bright with all the lights switched on. That the shop was brightly lit was also the evidence of the woman Goh Kim Soo (PW7) who was managing the shop that night. At that time he saw through the doorway, the single entrance between the saloon and the shop, Yong Seong Fatt in the saloon being asked to go somewhere by a black man. He could not identify the black man. At a glance he saw Yong Seong Fatt being slashed.

Lam had earlier seen Yong Seong Fatt resting in the saloon. The evidence of Goh Kim Soo (PW7) was that that her brother-in-law, Yong Seong Fatt, was not well that night and she had requested him to rest in the saloon.

The further evidence of Lam was that after witnessing the incident at the saloon he saw 2 blacks enter the shop. At that time he saw Goh Kim Soo (PW7) and deceased Yong How Fei sitting at a table near the entrance with their backs turned towards the entrance. He then saw a black use a chopper to "slash" the head of Goh Kim Soo (PW7). He also saw a black man "slash" Yong How Fee on the head. He could not identify the person or persons who had attacked both these persons.

Lam in his evidence stated that after the attack on the woman PW7 and deceased Yong How Fei (by a person or persons he could not identify) he saw 3 black intruders in the shop. Deceased Yong Seong Fong was doing accounts and tidying up the place and Lam was behind him. He saw the 2nd Accused drop the chopper. He and Yong Seong Fong who was behind him stepped on the chopper. Then he saw the 2nd Accused take the chopper to "slash" Yong Seong Fong and he also at the same time saw the 1st Accused "slash" Yong Seong Fong. After that the 1st Accused pulled him away from the rack and" … I was slashed." He then fainted.

Cross-examination of main eye witness – PW8

To revert to the principal witness Lam Yin Choy (PW8) he had stated that he recognized the 1st and 2nd Accused as they had been to the shop earlier. In regard to the 1st Accused he could identify him as he had come to the shop to buy things some times and on that day (he could not remember whether it was at night) the 1st Accused had come to the shop. In respect of the 2nd Accused, Lam said he had seen the 2nd Accused many times in the shop.

Under cross-examination Lam said he saw only 3 blacks come to the shop, when it was put to him there were more than 3 who came to the shop.

It was put to him as a result of the attack on him that he had fainted and he did not actually see what had happened. Lam denied that.

It was also put to Lam that the Accused were there but they did not attack him or the others and Lam said that that was not true.

Lam was adamant and unshaken about the identity of the 1st and 2nd Accused being the assailants that night as shown in the following questions by Mr. Karpal for the defence and answers by Lam.

Q: Since you had seen the 1st and 2nd Accused earlier you mistakenly mistook the 1st and 2nd Accused attacked you since they were there?

A: No.

Q: Put – there were more than 5 people – 5 blacks that night?

A: I only saw 3 persons.

Q: Put – you were generally mistaken these two attacked you?

A: Not true.

It has to be noted too that Lam had stated that in an Identification Parade (which Chief Inspector Jeremiah (PW75) said was held on 28.2.97) he identified the 1st and 2nd Accused. Chief Inspector Jeremiah stated that Lam identified the 1st Accused as being the man who cut him and the 2nd Accused as the man who cut his "tauke". Chief Inspector Jeremiah also gave evidence that none of the other eyewitness of the attacks in the shop could identify any of the accused as being the assailant in the shop on that day.

It is appropriate at this stage that at the close of the prosecution I accepted the evidence of Lam that it was the 2nd Accused and 1st Accused who "slashed" Yong Seong Fong with a chopper and it was the 1st Accused who "slashed him (Lam). The unchallenged evidence was clear from himself and the woman (PW7) that the place was brightly lit up. Lam was familiar with the 1st and 2nd Accused; he had seen the 1st Accused in the shop sometimes and he had seen him in the shop earlier that day; he had seen the 2nd Accused several times before. The quality of Lam's evidence was very good and my view is that he was not mistaken as to their identity as being the assailants as stated by him in his evidence.

I am mindful that the cross-examination of Lam was to show that while there were several other blacks in the shop and while the 1st and 2nd Accused were also at the shop during the attacks on the various victims the two did not take part in the attacks. The answers given by Lam were unwavering and firm – he stood by his evidence of the roles played by the 1st Accused and the 2nd Accused during the attack and was not shaken at all.

Having reviewed the reasons and findings of the trial judge on PW8's identification of the 1st and 2nd appellants we find no flaw in the assessment of the trial judge's finding of fact that PW8 had correctly identified the 1st and 2nd appellant on the perpetrators of the offence.

Even though the trial judge may not have alluded to the celebrated case of *R v. Turnbull (supra)* he had in fact, in his own way followed the guidelines propounded in the said case and held that the quality of the identification evidence remained steadfastly good.

The trial judge's assessment of the identification evidence remained so at the end of the defence. To that end we found no reason to disturb the findings of the trial judge.

In the context of the trial judge's treatment of the defence of the 1st appellant and 2nd appellant, once again we find no reasons to interfere with his findings *viz-a-viz*, the rejection of their version of events, as against the overwhelming evidence adduced by the prosecution, especially as regards the identification evidence of PW8 and that of the clear and unchallenged evidence of the Chemist in respect of the blood on the T-shirt and jeans of the 1st appellant.

For good measure we reproduce in 'extenso', the judgment of the trial judge in respect of the manner in which he assessed and eventually rejected the defence of 1st and 2nd appellants:

Defence of the 1st Accused

In the context of *Vasan Singh* it would appear that the defence of the 1st Accused was a bare denial. He said he was asleep in his house (where he shared a room with the other two Accused) on the night of incident after he had his food at KFC with Victor till 12 o'clock that night when Victor woke him up for him to make a telephone call to the U.S. He said he slept at 9 pm as he had injured his right leg after a football game in Taman Kosas in Ampang and after he had taken some pain killers.

He denied the prosecution version that he together with the 2nd Accused and 3rd Accused were walking together when the police arrested them.

He said that after waking up at 12 am he left the house with Victor to the Telekom booth and while he was talking to his brother in Nigeria someone came to the booth and asked for and checked his passport. As he was talking to this man someone came from behind and caught hold of his 2 legs, shouted at him "Negro" and kicked and beat him and he was bleeding from his face, nose and legs.

He heard 2 gunshots and he saw Victor fall. He was taken to a place where cars were parked and 10 minutes later Michael Philip, the 2nd Accused was brought there. 30 minutes later the 3rd Accused was brought there and then brought out somewhere only to be brought back some 45 minutes later.

As for the blood stains on his T-shirt he said it was his personal blood. The blood on his jeans came from the other two Accused. He also said he was never brought back to his house.

He said he attended an Identification Parade but it was "fixed". He took part in the parade and PW1 (Anajemba) picked up 3 pesons and said he was not one of the three. Then (Chief Inspector) Jeremiah made a telephone call and shortly after that he saw 2 persons behind a glass partition in the parade room after which they left and after a second that man came back after which PW8 (Lam) was called. PW8 went straight up to him and identified him. He did not know PW8. Then he went to Michael Philip and identified him. He denied having seen PW8 (Lam) before and he denied having gone to the shop before.

The defence of bare denial, if it can be called so, is probably more in the nature of the defence of alibi considering that by bringing in the name of Victor he wanted to show that between 9 pm (after Victor accompanied him for dinner) and 12 am the next day (when he was woken up by Victor) he was asleep and bearing in mind the reasoning of the Supreme Court, "We are therefore of the view that the word of s. 402A(1) given their natural meaning include the case where the accused alone is to testify that he was elsewhere at th material time."

Be that as it may and also bearing the illustrations given by the Supreme Court in Vasan Singh (at 414), I would have to consider his evidence as a bare denial of his presence there. The bare denial, however, flies in the face of the cogent evidence of Lam which I had accepted and continue to accept that he had recognized him as the person who attacked Yong Seong Fong and himself (Lam) with a chopper. Although he denied that he had been to the shop Lam was adamant he had seen him at the shop before. The evidence of identification by Lam of him was merely to confirm his recognition of the man. Neither Lam nor Chief Inspector Jeremiah was ever challenged that the Identification Parade had been "fixed" for Lam to identify him. Anajemba in evidence stated that he could not identify any person who assaulted him.

The 1st Accused's evidence that the blood on his T-shirt had come from his blood (from his bleeding face, nose and legs after he was beaten by the police) and the blood on his jeans had come from blood of the 2nd and 3rd Accused again flew in the face of the clear and unchallenged evidence of the Government Chemist that a DNA analysis of the Genotype HLA-DQ Alpha of the blood shown on the T-shirt was that of the blood of PW1, Anajemba; that the DNA analysis of the blood stains of the jeans found the Genotype HLA-DQ Alpha of the blood of the woman PW7 and of the blood of deceased Yong Seong Fong. It is argued that the DNA results are unreliable since for the genetic locus

HLA-DQ Alpha it is possible for others to have the same Genotype and the probabilities of it occurring on one type is 1 in 17 and on the other type 1 in 15 but the short answer to that it is highly improbable for the blood stains found to be coincidentally those of the victims of attacks in the shop.

No reasonable doubt at all was raised on the prosecution case that the 1st Accused was present at the shop at about 11 pm on 20.2.1997 and that he had attacked deceased Yong Seong Fong and Lam with a chopper – in fact the prosecution evidence was overwhelming.

It has also to be noted that, additionally, during the cross-examination of Lam the version was put to him that the 1st and 2nd Accused were present at the scene with 3 others but that they did not take part in the attacks. This was denied by Lam and it seems strange that he should now come out with a denial he was there.

Defence of the 2nd Accused

In his unsworn statement the 2nd Accused denied he was at the shop or that he took part in the attacks on the persons in the shop or that he and the other two Accused were arrested together.

His story was that at about 9 pm on that day he made a phone call at a telephone booth to his brother in Israel after which he went to the apartment. The landlady came to collect the rental from Victor. He saw the 3rd Accused there but did not see him after he had his shower. After the shower he dozed off and was woken later by Victor.

Victor went out and the Accused saw the T.V. set was still switched on although there was no programme being broadcast (meaning that it was past midnight).

As he approached an Indian restaurant together with a fellow footballer who joined him many people rushed at him and he was handcuffed. After a few minutes the 1st Accused called him from some distance. Then the 3rd Accused was brought there and then he was taken away and was brought back later.

He said at an Identification Parade a Nigerian (presumably PW1) identified 3 persons and he was not one of them. He said (Chief Inspector) Jeremiah made a call and two people "stretched their necks" to view them at a glass partition, "they did not identify me". After that they called PW8 and he straightaway touched him.

Again I have to consider this defence as not being one of alibi which requires a notice under s 402A but one of a bare denial of his presence.

> His evidence contradicted again the evidence of Lam which I had accepted and still accept as being true that he saw the 2nd Accused drop his chopper, pick it up an slash deceased Yong Seong Fong. His evidence was that he had seen the 2nd Accused many times before the incident in the shop. His recognition of the 2nd Accused was confirmed when he identified him at an Identification Parade. Again I have to reiterate that neither Lam nor Chief Inspector Jeremiah was challenged that the Identification Parade had been "fixed" for Lam to identify him or that Anajemba had identified 3 other persons.
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> His evidence that he was sleeping in his house during the time the attacks took place at the shop does not raise any reasonable doubt in the prosecution's clear and cogent case that he was there in the shop and he had attacked deceased Yong Seong Fong.
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> Again it will be remiss on my part not to state that when Lam was cross-examined to the effect that wile the 1st and 2nd Accused were there they did not take part in the attack and Lam denied that; that they were there was not disputed.

We note that the trial judge stated that though neither PW8 nor PW75 (Chief Inspector Jeremiah) were ever challenged that the identification parade had been "fixed" so to speak, to enable PW8 to identify the 1st appellant. However, he did bear in mind that that failure in itself, did not relieve the prosecution of its duty of establishing the charge against the 1st appellant beyond reasonable doubt. The trial judge went on further to consider the defence of the 1st appellant as tenuous, far fetched, or false, as might have been as against the truth of the prosecution's case.

The trial judge before convicting the 1st appellant and 2nd appellant gave due consideration as to why the defence of the 1st and 2nd appellants, though could not be believed, did not raise a reasonable doubt in the prosecution's case. We find that the test propounded in *Mat v. PP* [1963] 29 MLJ 263 was actually applied by the trial judge.

In respect of the 3rd appellant, it cannot be gainsaid, that there was no identification evidence to link him to the murders of the various deceased persons mentioned in the charges. This has been acknowledged by the trial judge in his grounds of judgment. The only evidence linking the 3rd appellant with the said charges was largely circumstantial evidence, and once again the trial judge had in his own way acknowledged this aspect when dealing with the prosecution's case against the 3rd appellant and subsequently the defence of the 3rd appellant.

For completeness we reproduce the judgment of the trial judge in respect of the evidence against the 3rd appellant:

> No one visually identified the 3rd Accused at the scene of crime. But as was disclosed earlier there was a RM5 note recovered from the trousers's pocket which he wore during the arrest from a bundle of 60 RM5 currency notes and it had blood stains. The blood stain son DNA analysis revealed the Genotype HLA-DQ Alpha of the blood of the woman PW7 and also of the blood of the man attacked subsequent to the woman and Yong Seong Fong.
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> I am mindful of what Edgar Joseph J SCJ stated in *PP v. Lim Lian Chen* [1992] 2 MLJ 561 in regard to circumstantial evidence, "It is trite law that where the prosecution is relying in circumstantial evidence the onus upon it is a very heavy one and that the evidence must point irresistibly to the guilt of the accused. If there are gaps in it then that will not be sufficient."
>
> One can argue that the RM5 currency note having the incriminating DNA Genotype by itself does not prove that he was present at the scene of crime; he could have recovered the note innocently. But when one considers the shirt with the incriminating DNA Genotype of the blood of both the woman and Yong Seong Fong it is difficult to envisage blood from the two getting on to his shirt unless he was wearing the shirt and was physically in close proximity to them and blood from the two persons has stuck to his shirt. In that context it is fair inference that the Accused must have picked up the incriminating RM5 note which was with 59 pieces of RM5 currency note in a bundle when he was in close proximity to the woman.
>
> The evidence relating to the incriminating RM currency note and 59 other notes and other money and 2 watches found on his person must be related to the evidence of PW7 that she was separating the money into denominations (which included RM5 currency notes) when she was attacked. There was the evidence of the investigating officer ASP Ting that when he visited the shop shortly after the murders he did not recover any money from the premises. There was also evidence that the shop sold watches.
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> All these taken in the context that he ran when the police approached him shortly after the murders and that he had 2 watches and over RM1,500 cash on his person including 60 pieces of RM5 currency note shortly after the robbery and murder irresistibly point to the fact that he was present and a partner in the crimes committed earlier.

Now as far as we can find the prosecution's case against the 3rd appellant was that a blood stained RM5 note was recovered from him. The blood on a DNA analysis revealed the Genotype HLA-DQ Alpha of a woman PW7 and the blood of a man attacked subsequent to the assault on PW7, and the deceased Yong Seong Fong.

Quite rightly the learned trial judge found that the recovery of the said RM5 note in itself had no bearing on the involvement of the 3rd appellant in the said crime, as it could not in itself stand to prove that he was present at the scene of the crime. He could have received the said note, innocently.

But then that was not the only piece of evidence that the prosecution proffered against the 3rd appellant. The prosecution had relied on the evidence of PW33, ASP Thomas Navamoney who in the main said in evidence that the 3rd appellant had allegedly gave him certain information at about 4.15pm on 21 February 1997 which led to the discovery of a blood stained shirt P43A. The bloodstain in a DNA analysis revealed the blood of PW7 and the deceased Yong Seong Fong. We use the word "allegedly", advisedly, as it was a bone of contention of counsel for the 3rd appellant that the giving of the information by the 3rd appellant to PW33 is disputable.

PW33 narrative of evidence in court deserves reproduction:

> On 20.2.97 at about 9 am I directed Corpl. Ali to escort to bring the all 4 suspects to Serious Crime Division for investigating purposes. At about 10.30 am Corpl. Ali and his team brought the 4 suspects to Serious Crime Division for further investigation.
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> Again an investigation team was set up by Sgt. Ang.
>
> At about 4 pm on same day L/Corpl. Murali came to my office and informed me that Lawrence Osayi wished to meet my officer (L/Corpl. Muralitaran a/l Kandasamy brought in and identified). I do not know how many officers at Serious Crime (D9) that day.
>
> I instructed L/Corpl. Murali to bring Lawrence to see me. Lawrence is the 3rd Accused (points to him). Corpl. Murali brought Lawrence to see me. Then Murali left the office. I was left alone. Then Lawrence told me …
>
> "…."
>
> The 3rd Accused told me something. I recorded what the 3rd Accused told me. He gave me this information at about 4.15 pm. After I had lodged report I brought Lawrence with L/Corporal Murali and L/Corporal Mazlan to Taman Wawasan at Ampang. We were guided by the 3rd Accused. On arrival at Jalan Wawasan the 3rd Accused pointed out to me a drain and said something to me. Then we followed the flow of water in the drain from a distance of 30 meters when we arrived a motorcycle workshop. There near the workshop there was a wooden bridge. Then the 3rd Accused showed through his facial expression a bundle under the bridge. Then I instructed L/Corpl. Murali to retrieve the bundle. I opened the bundle at the side of the road in the presence of the 3rd Accused. He told me something. Then I brought the 3rd Accused and the bundle to my office.

When I opened the bundle at the side of the road I saw a short sleeved shirt with coloured check. Then I lodged a report on arrival at my office.

Q: See P43A?

A: This is the shirt I saw.

The bundle I saw was a while plastic bag. I kept the plastic bag. This is the plastic bag (P87)

I handed P43A to ASP Teng Kim Bah on 5.5.97. This the hand over list (P88). It is the first item on the list.

Q: Go back to statement the 3rd Accused made in your office which lead to the discovery?

A: He said, "I will show you where I threw my blood stained shirt".

Q: At the 1st place after arrival at the spot where he showed you?

A: "This is where I threw the shirt."

Q: Subsequently after the workshop where he pointed at something with his facial expression what did he say?

A: "That could be the bundle."

The trial judge had when analyzing the evidence of the 3rd appellant against the backdrop of the evidence had this to say:

Although he said he did not lead the police to the discovery of the shirt which was recovered under a bridge ASP Navamoney's evidence was clear that he did and this was not challenged. I will have to note that ASP Navamoney was cross-examined about Lance Corporal Murali having assaulted the 3rd Accused in front of him on 24.2.97 which the ASP denied. The date of the alleged assault is given as 24.2.97 but it has to be pointed out that the discovery was made on 22.2.97 and clearly the alleged assault cannot affect the evidence relating to the discovery.

He had stated "I will show where I threw my blood stained shirt" and he guided the police to Taman Wawasan at Ampang and then pointed to a drain and stated, "this is where I threw the shirt." The police followed the flow of the water in the drain till they arrived at a wooden bridge where he showed through his facial expression a bundle under the bridge and when the bundle (the shirt) was recovered he said, "That could be the bundle."

This shirt had blood stains and the Government Chemist stated that DNA analysis revealed the Genotype HLA-DQ Alpha of the blood of the woman PW7 and also of the blood of deceased Yong Seong Fong.

> … The irresistible inference was that that the 3rd Accused was present and has participated, in the context and of s. 34 of the Penal Code, in the attacks on PW7 and Lam and the killings of the 3 deceased and his defence that he was elsewhere at the time of the attacks has not created any reasonable doubt on the case of the prosecution that he was there and was in concert with the others in the killings of the 3 deceased.

On review we find that the trial judge may have erred when he, unquestionably accepted the evidence of PW33 about the alleged information given by the 3rd appellant to him, which led to the discovery of the blood stained shirt. It must be borne in mind that ASP Thomas Navamoney had stated in evidence that on receipt of the information from 3rd appellant, he had proceeded to lodge a report. In vain the report was not tendered as evidence in court. We also note from the record of proceedings the information by 3rd appellant was supposed to have been given on 20 February 1997 at 9am.

This again cannot be correct as the charge against the appellant is for a crime that was committed on 20 February 1997 at 11.15pm. We are prepared, however, to accept that this might have been a typographical error.

ASP Thomas Navamoney was also supposed to have lodged a report after the discovery when he returned to his office. Once again, this report was not exhibited in court.

There was also the evidence adduced through ASP Thomas Navamoney that the 3rd appellant was supposed to have pointed at something with his facial expression and said "that could be the bundle".

We are mindful of the fact that nodding has been construed as part of a statement. See *Lee Lian & Ors v. PP* [1956] 22 MLJ p. 191, when Thomson J (as he then was) held "Statement must be construed as including action such as pointing out a person at an identification parade and *PP v. Siew Sung* [1966] l MLJ p. 145, when H.T. Ong Ag. CJ (as he then was) held that even operating a pin-table machine with a key by an accused at a police station amounted to the making of a statement.

In *Lim Kah Wan v. PP* [1985] 2 CLJ 473; [1985] CLJ (Rep) 530, Edgar Joseph Jr. J (as he then was) had held as follows:

> What the appellant said just before he nodded his head namely "Don't waste your time" and immediately after "That the stuff" were so inextricably interwoven that both verbal statements and the action of nodding had to be admitted in order to understand what the appellant intended to convey.

In the present instance, however, we note that there is a paucity of evidence whether the statement purportedly made by the 3rd appellant, and his facial expression which led to the discovery of the offending object, WAS made contemporaneously, so as to be so inextricably linked, to be admitted to, as a statement of the 3rd appellant. There must be evidence we hold of a nexus between the statement and the facial expression of the 3rd appellant for it to be admitted as cogent evidence.

Even the phrase "facial expression" which ASP Thomas Navamoney stated that the 3rd appellant made, leaves much to be desired. No evidence we find was adduced in court to state what exactly the facial expression looked like, or seemed like for the court to assess.

Thus, with the greatest of respect, we must depart from the trial judge's finding on this issue and held that we reject the admission of such a statement from the 3rd appellant.

There were also challenges mounted on PW33 in regard to the 3rd appellant being assaulted by police officers whilst in custody. This was alleged to have taken place on 24 February 1997. The trial judge had not discounted the fact that the assault may have taken place, but instead held that the date of the alleged assault was on 24 February 1997, whilst the information leading to the discovery was made on 22 February 1997. The trial judge then held that the assault could not affect the discovery. We are slightly disturbed by this finding of the trial judge, for to our minds even though the trial judge had obliquely accepted that the 3rd appellant had been assaulted, he demurred from exploring the possibility of the 3rd appellant being assaulted prior to the information given leading to the discovery.

We are not unaware of the desirability of protecting an accused person against any possible misuse of power by overzealous police personnel whilst under police custody. As Abdul Hamid Omar LP observed in the case of *Pang Chee Meng v. PP* [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265:

> … We are firmly of the view that in invoking s. 27, the Court should be very vigilant to ensure respect of the section which is so vulnerable to abuse.

We are equally cognizant of the fact that it is the position in Malaysia, that s. 27 of the Evidence Act is an independent section. In that, so long as the evidence constitutes "information" under s. 27 relating to facts thereby discovered, it is admissible without the necessity of making reference to s. 24 of the same Act, s. 113 of the Criminal Procedure Code, or sections with similar effect in other enactments. See the case of *Goi Ching Ang v. PP*

[1999] 1 CLJ, p. 829 which reaffirms this principle. Hence, *Goh Ching Ang (supra)* does recognise the fact that if the trial judge entertains suspicion or doubt as to the voluntariness of the s. 27 information the trial judge should exercise his discretion as to whether or not to admit such information as part of the evidence at the trial.

The Federal Court in *Goi Ching Ang (supra)* case went on to quote a passage in the judgment in *Vijay Kumar v. State of Himachal Pradesh* (1978) Criminal Law Journal 1, 1619 wherein Mehta Actg. CJ had this to state:

> We are further of the opinion that even apart from s. 24, s. 27 of the Evidence Act contemplates only those statements of the accused which are voluntary in character. It need not be emphasized that if the statement in question is not voluntary and is procured by inducement or threats or by the use of third degree methods, it ceases to be the statement of the accused, and if it ceases to be the statement of the accused it is difficult to comprehend how s. 27 would be of any help, because that section makes reference only to the statements which are made by the accused and not by other persons.
>
> If it is held that the Police procured a discovery statement from the accused under inducements and threats and even by resorting to third degree methods, then it would be easy for an unscrupulous Police Officer, who has a prior knowledge about the place of concealment of an article which is used during the commission of the offence, to obtain the required statement from the accused who is in his custody and then to utilize it against him during the course of the trial. Such a situation is obnoxious to judicial conscience. If resort can be had to compulsion or inducement in the matter of testimonial utterances, the truth runs the risk of being smothered and the judicial decision which are is based on the discoveries which tainted by falsehoods would never be conducive to justice. Therefore, even on a bare reading of the provisions of s. 27 we have no doubt in our mind that the statement of the accused contemplated by that section must be a voluntary statement, and not the one which is induced by threat, inducement or third degree methods.

To this vexed question of voluntariness of s. 27 statement, it is patently clear from the judgment of *Goi Ching* Ang that there is a vested discretion for a trial judge to exclude evidence which is prejudicial to an accused person even though the said evidence may be technically admissible.

Against the present set of facts it is our considered view, that the trial judge may have been slightly flippant when dealing with the issue of the 3rd appellant being assaulted by the police. To recapitulate, the trial judge did obliquely state that since the date of the assault occurred two days after the information leading to the discovery, it could not have affected the voluntariness of information leading to the discovery. We interject to consider

the possibility *viz-a-viz* if the assault against the 3rd appellant did take place two days after the discovery, what was then to stop them (police) from committing the assault earlier in order to extract information prior to leading to the discovery. In fact one may wonder the reason for such assault since there was already discovery made earlier on as a result of alleged information provided by the 3rd appellant. There was also evidence from PW33 himself, the said ASP Thomas Navamoney, that a complaint was made by one of the accused persons to the magistrate, during the period of detention that he was assaulted while in police custody. ASP Thomas Navamoney did not state which of the accused had lodged the complaint but the fact remains a complaint was made to the magistrate, and it was evidence adduced in the case. The complaint may have well been from the 3rd appellant; we will never know. The prosecution had not adduced evidence to the contrary to remove this lingering doubt. We hasten to add that we are not speculating here on some fanciful doubts created on a whim, but are considering legitimate doubts borne out by this evidence before us.

To that end we have no qualms at this stage of review to reject the information leading to the discovery of the offending exhibits as we have grave doubts not only on the overall evidence of PW33, in particular on the missing police reports which he alleged to have made but also on the surrounding circumstances leading to the giving of the information. Shorn off this evidence we find no evidence to link the 3rd appellant with the said crimes. The mere fact that the 3rd appellant absconded when seeing the police personnel is to our minds not indicative of his guilt of the offences in question. (See: *PP v. Ooi Chin Seng* [1991] 1 CLJ 609; [1991] 3 CLJ (Rep) 611).

For these reasons we dismissed the appeals of the 1st and 2nd appellants, but allowed the appeal of the 3rd appellant.